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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1996

OHIO ASSOCIATION OF INDEPENDENT SCHOOLS, et al.,
Petitioner,

v.

JOHN GOFF, et al.,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State's dictating the content of one's speech in private independent schools, via a mandatory proficiency/exit test consisting of government-prescribed questions and answers, is unconstitutional because it

(a) violates the fundamental rights of privacy and freedom of speech by compelling teachers and students to utter government-prescribed speech,

(b) is not narrowly tailored to serve a compelling government interest, and

(c) alternatively, bears no rational relationship to a legitimate government interest.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Plaintiffs-Appellants:

None of the Plaintiffs-Appellants who are corporate entities have parent companies or wholly-owned subsidiaries.

1. Ohio Association of Independent Schools

2. Columbus Academy
   The Columbus Academy is a not-for-profit corporation.

3. Douglas W. MacKelcan, Jr.

4. The Grand River Academy

5. The Andrews School
   The Andrews School is a not-for-profit corporation.

6. Maumee Valley Country Day School
   Maumee Valley Country Day School is a not-for-profit corporation.

7. Marilyn Sawyer Sommers

8. Benjamin D. Sommers, a minor by Jeffrey and Marilyn Sommers, his parents and guardians

Defendants-Appellees:

1. John Goff, Superintendent of Public Instruction, State Board of Education

2. George Voinovich, Governor of Ohio

3. State Board of Education, Ohio Department of Education

4. Virginia Milner Purdy, President, State Board of Education

5. Oliver Ocasek, Vice President, State Board of Education

6. Virginia E. Jacobs, Member, State Board of Education

7. Martha W. Wise, Member, State Board of Education

8. Diana M. Fessler, Member, State Board of Education

9. Melanie Bates, Member, State Board of Education

10. Anita M. Tighe, Member, State Board of Education

11. Marie S. Pfeiffer, Member, State Board of Education

12. Arline Smith, Member, State Board of Education

13. Virgil E. Brown, Member, State Board of Education

Amici Curiae, in support of Plaintiffs-Appellants:

1. National Association of Independent Schools

2. Independent Schools Association of the Central States

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I. CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

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Ohio Association of Independent Schools, et al. v. John Goff, et al., 92 F.3d. 419 (6th Cir. 1996).

Ohio Association of Independent Schools, et al. v. John Goff, et al., No. C-1-95-907, (S.D. Ohio Jan. 30, 1996).

II. BASIS FOR JURISDICTION

The United States Court of Appeals decision sought to be reviewed herein was entered on August 9, 1996. The Order Denying the Petition for Rehearing was entered on September 25, 1996. This Court's jurisdiction is invoked under U.S. Const. art III, § 2 and 28 U.S.C. § 1254.

III. CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The provisions of the United States Constitution involved in this case are the following:

1. Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

2. The First Amendment to United States Constitution:
   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend. I.

IV. STATUTES AND REGULATIONS INVOLVED IN THIS CASE

This case concerns the constitutionality of the following sections of the Ohio Revised Code Annotated and the Ohio Administrative Code, which together dictate the relevant requirements of the State's mandatory testing program. The pertinent text of each section is set out in Appendix B.

1. Ohio Rev. Code Ann. §§ 3301.16
2. Ohio Rev. Code Ann. §§ 3313.612
3. Ohio Rev. Code Ann. § 3301.0710
4. Ohio Rev. Code Ann. § 3321.03
5. Ohio Rev. Code Ann. §§ 3321.38
6. Ohio Rev. Code Ann. §§ 3321.99

1. Ohio Admin. Code § 3301-35-02
2. Ohio Admin. Code § 3301-35-04

V. STATEMENT OF THE CASE

Basis for federal jurisdiction in the United States District Court, Southern District of Ohio:

Petitioners sought the District Court's jurisdiction pursuant to Rule 65 of the Federal Rules of Civil Procedure; the First and Fourteenth Amendments of the United States Constitution; Section 7, Article 1 of the Ohio Constitution; and 28 U.S.C. §§ 1331, 1343 as well as 42 U.S.C. § 1983.

Procedural Posture:

This action was commenced on October 18, 1995 by the Ohio Association of Independent Schools and related parties ("OAIS") to challenge newly effective Ohio law requiring private schools to administer the Ninth Grade Proficiency Test ("NGPT"). The challenged law denies a high school diploma to students who do not pass the test, and revokes the charter of private schools who do not administer the test. The OAIS Plaintiffs sought an injunction to prohibit the State from revoking the charter of any private school which refused to administer the test. The United States District Court, Southern District of Ohio, held that all Plaintiffs except the OAIS schools lacked standing, and that merely administering the test did not implicate any fundamental rights of the OAIS member schools. The court denied Plaintiffs the relief sought and dismissed the case. Plaintiffs appealed. Apart from ruling that all Plaintiffs except for Marilyn and Jeffrey Sommers had standing, the United States Circuit Court of Appeals for the Sixth Circuit affirmed the District Court's decision on August 9, 1996. The Plaintiff's petition for rehearing was denied on September 25, 1996.

Background Facts:

On or about June 30, 1992, the State of Ohio adopted state-wide proficiency testing through Ohio Rev. Code Ann. ("O.R.C.") § 3301.0710. This legislation required the State Board of Education to establish five state-wide proficiency tests and to determine and designate the score on each test that shall be deemed to be at least a ninth grade level of literacy and basic competency. O.R.C. § 3301.0710 (B). Pursuant to this legislation, the State developed the NGPT. The NGPT is an "exit" test.

Initially, chartered private schools had the option to participate in the NGPT, but were not required to do so. OAIS member schools did not expect to ever be required to administer the NGPT. However, the State dramatically altered the NGPT's scope and requirements in 1993 by enacting O.R.C. §§ 3301.16 and 3313.612. With that legislation it became mandatory for OAIS member schools to participate in the NGPT beginning in July 1995.

Students who exercise their constitutional right to attend private schools are now required to attend private schools that administer the State-developed NGPT.

Under O.R.C. § 3313.612, students of both public and private schools who do not pass the NGPT by the twelfth grade cannot receive a high school diploma.

Under O.R.C. § 3301.16, the State Board of Education will revoke the charter of any Ohio private school that fails to comply with this new, mandatory law.

Parents whose children do not attend chartered schools are subject to criminal sanctions. O.R.C. § 3321.38(b).

VI. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

In this case, the Supreme Court has the opportunity to resolve the following arguments and important questions of constitutional law that have not been, but should be, settled by this Court:

1. Substantive Due Process and the Fundamental Right of Privacy

(a) Where does one draw the line between the State's authority over education and the right of private independent schools to determine their curricula?

The Court of Appeals' approval of the NGPT law basically nullifies the Supreme Court's ruling in Meyer v. Nebraska, 292 U.S. 390 (1923), because its regulation of private schools' curricula far exceeds the boundaries set by the Meyer case. Although the State may require students to attend some sort of school, the State's authority in the educational context is not unlimited. Meyer, 262 U.S. 390. Private schools have a right to develop their curricula and to teach children in a manner in which they see fit. Meyer, 262 U.S. 390.

By imposing curriculum requirements via a testing program, the State is doing implicitly what it is prohibited from doing explicitly.

Trial testimony indicated that the tests drive the curriculum. Because the NGPT tests specific content at a specific time, particularly by the

ninth grade, it regimentalizes the curriculum of Ohio schools. The testing program is based upon the public schools' curriculum and not upon the college preparatory curriculum of the OAIS member schools.

The State's decisions of what material to test displace the private schools' educational decisions of what material to teach. Thus, by forcing private schools to administer the NGPT, the State of Ohio is dictating the curriculum of private schools.

Theoretically, OAIS member schools could merely administer the test and allow their students to fail by not adjusting their curricula to teach the government-prescribed questions and answers. Despite theory, the reality is that this testing program implicitly compels the schools who administer the tests to also teach the specific content of the questions and answers on the test. Trial testimony indicated that test results would be published in the newspapers. The latter comparison of results of OAIS member school students with public school students effectively forces the OAIS member schools to change their curricula in order to prepare their students for the test.

Moreover, implicitly requiring the schools to teach the content of the test combined with requiring that the test be administered in the ninth grade, effectively prohibits the private schools from teaching content different from the government-prescribed questions and answers. As a result, the NGPT law serves to eliminate the distinguishing feature of private schools: being able to provide an alternative to public education. Thus, the NGPT law far exceeds the State's limited right to regulate schools and unreasonably interferes with the liberty of parents to direct the upbringing and education of their children. *See* Meyer, 262 U.S. 390; Pierce v. Society of Sisters, 268 U.S. 510 (1925).

(b) Does the fundamental right of privacy protect wholly secular interests, or is it grounded upon the free exercise clause of the First Amendment?

The decision of the Court of Appeals limits the constitutional protection recognized in Supreme Court precedent by stating that because the State's limitations on schools are wholly secular, fundamental rights are not implicated. The opinion acknowledges that parents have a constitutional right to send their children to private

schools. However, the opinion also states that strict scrutiny should apply to Fourteenth Amendment claims only "where they are coupled with a challenge based on the free exercise clause of the First Amendment. *Absent a free exercise challenge, however, the Court has applied rational basis review . . . .*"(emphasis added) (citing Runyon v. McCrary, 427 U.S. 160, 178 (1976)). Hence, one's religion must be at issue in order to invoke the protection of substantive due process.

A better interpretation of Supreme Court precedent is that the fundamental right of privacy includes the right to direct the education, secular or religious, of one's children. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer, 262 U.S. 390; State v. Whisner, 47 Ohio St. 2d 181 (1976). In Pierce v. Society of Sisters, the Supreme Court held that the fundamental right of child rearing restricted the State's ability to mandate a *public* education by *requiring* students to attend public schools. 268 U.S. 510 (emphasis added). The Court recognized that the Society of Sisters conducted both *secular and religious* education in primary and high schools and junior colleges. Pierce v. Society of Sisters, 268 U.S. at 531-32 (emphasis added). The Court held the statute unconstitutional because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." Pierce v. Society of Sisters, 268 U.S. at 534-35.

The Ohio law essentially circumscribes the Pierce decision by subjecting private school students to public school measures. In other words, rather than bringing every student to government-dictated education, this law brings government-dictated education to every student. Justice McReynolds stated in the Pierce ruling:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from *public* teachers only. (emphasis added)

Pierce v. Society of Sisters, 268 U.S. at 535. The fact that the education may be secular rather than religious should make no difference.

(c) What is the basis upon which individual civil liberties that do not have clear textual bases in the Constitution are considered "fundamental" rights?

In their one volume treatise on constitutional law, Professors Nowak and Rotunda state:

> The basis upon which the Court declares an aspect of liberty to be a fundamental constitutional right remains vague today. * * * There has been little agreement on the Court or among scholars concerning the proper basis upon which the Justices should declare a right to be fundamental.

Nowak, John E. and Ronald D. Rotunda, Constitutional Law, § 11.7 (5th ed. 1995). The professors list three different bases that may possibly be used by the Court: 1) the text of the Constitution, 2) history and tradition, and/or 3) natural law. Nowak, John E. and Ronald D. Rotunda, Constitutional Law, § 11.7 (5th ed. 1995).

Since this case is a substantive due process case involving the fundamental right of privacy, this case provides an opportunity for the Court to discuss this unresolved, much-debated question.

2. Substantive Due Process and the Fundamental First Amendment Right of Freedom of Speech

(a) What are the constitutional limits on government-prescribed speech?

Since the NGPT law imposes government-prescribed speech, the Court has an opportunity to define the limits on government-prescribed speech.

The Court of Appeals misconstrues Supreme Court precedent by stating that the NGPT law does not violate the First Amendment free speech rights because it does not restrict the teaching of any material. This holding is inconsistent with the Supreme Court's decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), which recognized that the State may also violate the First Amendment by imposing speech. The Court held that a State cannot force school children to pledge allegiance to the United States. Despite the fact that

the children in that case were members of a religious sect, the Court based its opinion on the free speech clause of the First Amendment. "[N]o official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. 624 (1943). *See also* Wooley v. Maynard, 430 U.S. 705 (1977); Pacific Gas & Electric v. Public Utilities Commission, 475 U.S. 1 (1986).

In addition, the Court of Appeals' ruling is inconsistent with the opinion of Justice Douglas in Griswold v. Connecticut:

> [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the *right to distribute*, the right to receive, the right to read and freedom of inquiry, freedom of thought, and *freedom to teach*--indeed the freedom of the entire university community. (emphasis added). 381 U.S. 479 (1965).

The following three points explain how the NGPT law imposes government-prescribed speech.

(1) The NGPT law imposes government-prescribed speech upon students who are required to pass the test in order to receive a high school diploma.

The NGPT law imposes government-prescribed speech because it imposes learning outcomes which specify the material that must be learned. By denying a high school diploma to students who do not answer enough questions the way that the State has determined they should answer them, the statute punishes students for not answering questions in a certain way. The District Court compared the NGPT to a state-wide "final exam." It is true that teachers often test what has been taught, including certain viewpoints. However, students may currently choose other teachers and schools, so that if they do not want to express themselves a certain way in order to pass a certain class, they can drop the class or change schools. With a mandatory state-wide "final," the students' only choice is to say what the government wants them to say, or be denied a high school diploma.

In any area of study, certain topics can be subjected to more than one bias or interpretation. Currently, the NGPT purports to test proficiency in reading, writing, mathematics, science and citizenship. This Court has already seen conflicting theories in the subject area of science on topics such as evolution. *See* Edwards v. Aguillard, 482 U.S. 578 (1987) *and* Epperson v. Arkansas, 393 U.S. 97 (1968) (involving the establishment clause and curriculum controls). Requiring students to answer questions, especially in the areas of reading and writing, in a way that the State has pre-determined is "right" allows the State to force individuals to endorse the content of messages favorable to the government. "The government should not be able to force a person who objects to a position to endorse that position absent the most unusual and compelling circumstances." Nowak, John E. and Ronald D. Rotunda, Constitutional Law, § 16.11 (5th ed.1995).

(2) The NGPT law imposes government-prescribed speech upon private schools who must administer the test in order to maintain their charter.

The Supreme Court has held that certain conduct may amount to "speech." United States v. O'Brien, 391 U.S. 367 (1968); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). The Court could use this case to clarify that the First Amendment is violated when a State compels teachers and students to utter specific content-based ideas and to endorse those ideas by participating in their administration.

The conduct of administering the NGPT test is "speech" because it communicates to students the message the test is important enough for the school to: 1) spend several school days administering the test rather than instructing the students, and 2) change its curriculum to teach the test. Furthermore, administering the test communicates the endorsement of the content of the test, because the student is receiving the message that the student should "know" this material as a result of the private school's instruction.

The NGPT law fails the test established in the O'Brien case for government restrictions on expressive conduct. 391 U.S. 367. Despite the State's limited authority to regulate educational matters, the NGPT

law unconstitutionally infringes on the fundamental rights of privacy and freedom of speech. In addition, mandating the curriculum of private schools suppresses the private schools' creativity and educational expression. Lastly, the NGPT law's restriction on first amendment rights is far greater than any restriction, if at all, that may be necessary to further the State's educational interests.

(3) The combination of Ohio's compulsory education law and the NGPT law allows the State to criminally sanction parents whose children do not attend a "chartered" school--a school that complies with the NGPT law.

Although OAIS member schools typically grant substitutes for diplomas, OAIS member parents, students and schools are injured by the combined effect of O.R.C. § 3301.16 and Ohio's compulsory attendance law which requires attendance at a chartered school.

Schools that do not administer the test will loose their charter. Parents and children that do not send their children to chartered schools may be subject to criminal sanctions for violating the State's compulsory attendance law, which requires attendance at a chartered school.

3. The NGPT Law is not Narrowly Tailored to Serve a Compelling Government Interest

Since fundamental rights are at stake, the statute imposing the NGPT is valid only if it is narrowly drawn to serve a compelling state interest. *See*, Roe v. Wade, 410 U.S. 113 (1973). The State's purported interest is to ensure that private school students learn the subject areas required by the state's minimum standards. Ample testimony indicated far less intrusive means than infringing on the rights of privacy and freedom of speech. For example, previously, a member of the State Department of Education would visit an OAIS member school for several days, during which he or she would interview teachers and students and examine the curriculum to ensure that the state's minimum standards were being met.

Furthermore, the scores of students of OAIS member schools on achievement tests, standardized tests such as the SAT and ACT, and

advanced placement tests demonstrate that the OAIS member schools exceed the minimum standards sought to be "ensured" by the NGPT law. In addition, close to 100% of the students of OAIS member schools are admitted to four-year degree-granting colleges or universities.

Under the strict scrutiny analysis, the law imposing the NGPT on private schools unconstitutionally burdens the fundamental rights of parents to direct the education of their children and the fundamental First Amendment rights of teachers and students.

4. Rational Basis Argument

Alternatively, even if the Court applies a rational basis test, then this case gives the Court an opportunity to define "rational relationship" by setting an example of what is *not* a rational relationship, because the NGPT law is arbitrary and irrational.

Under the rational basis test, legislation must be rationally related to a legitimate governmental interest. Department of Agriculture v. Moreno, 413 U.S. 528 (1973). To overcome legislation under the rational basis standard of review, there must be a clear showing that the legislation is arbitrary and irrational. Hodel v. Indiana, 452 U.S. 314 (1981).

The Court of Appeals affirmed the District Court's ruling that the law required schools merely to administer the test, and nothing more. If this Court accepts the notion that the law's only effect on private schools is to administer a test, then Petitioners respectfully submit that the physical act of passing out papers bears absolutely no connection to ensuring that students learn.

Thus, no rational relationship exists between the NGPT and the stated governmental interest.

VII. CONCLUSION

By upholding the constitutionality of the NGPT law, the decision of the Court of Appeals conflicts with Supreme Court precedent. Ohio's NGPT law infringes on First and Fourteenth Amendment rights by mandating that the schools alter their curricula to conform to the test. Parents and children thereby lose their fundamental constitutional rights

to speak freely and to choose a private education as an alternative to the public school system. Because fundamental rights are adversely affected, albeit by wholly secular limitations, courts should use the strict scrutiny standard. Alternatively, even under rational basis standard, there is no rational relation between the law and the government purpose.

Based upon the foregoing questions, facts, arguments, and authorities, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0260P (6th Cir.)
File Name: 96a0260p.06

No. 96-3116

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO ASSOCIATION OF INDEPENDENT SCHOOLS, et al., *Plaintiffs-Appellants,*		
v.	>	On Appeal from the United States District Court for the Southern District of Ohio
JOHN GOFF, et al., *Defendants-Appellees.*		

Decided and Filed August 9. 1996

Before: MERRITT, Chief Judge; KEITH and SUHRHEINRICH, Circuit Judges.

SUHRHEINRICH, Circuit Judge. This case involves a state requirement that nonpublic high schools administer the same proficiency tests as public high schools to students prior to their graduation. Plaintiffs, who include or represent certain private secondary schools in Ohio, appeal the district court's decision upholding Ohio statutes

requiring private as well as public schools to administer ninth grade proficiency tests. Plaintiffs sought a declaration against the state and various state officials that the statutes at issue violated the First and Fourteenth Amendments and requested injunctive relief prohibiting their enforcement. We **AFFIRM** the order of the district court and uphold the testing requirement as rationally related to a legitimate state interest.

I.

In 1987, the Ohio legislature enacted legislation directing the State Board of Education to establish a statewide program of proficiency testing in Ohio schools. Ohio Rev. Code Ann. s 3301.0710 (Anderson Supp.1995). The tests were to be administered at some point between the fourth and ninth grades and cover five areas: reading, writing, mathematics, science and citizenship.

Pursuant to s 3301.0710, the Board of Education developed proficiency tests to be administered statewide in the ninth grade ("Ninth Grade Proficiency Test" or "NGPT"). In developing the tests, the Board solicited input from both public and private educators between the years 1987 and 1992. Most private school educators, however, chose not to participate in the development of the tests because it was assumed until 1993 that the testing would be optional for private schools.

In 1993, the legislature passed new statutes requiring private schools to participate in the testing program as well. Section 3301.16 mandated that private schools administer the tests as of July 1995 or lose their charters:

> . . . [N]o charter shall be granted to a nonpublic school unless . . . the school elects to administer the tests prescribed by [s 3301.0710] beginning July 1, 1995 . . . . The state board shall also revoke the charter of any nonpublic school, that . . . does not participate in the testing program prescribed by [s 3301.0710] . . . .

Ohio Rev. Code Ann. s 3301.16 (Anderson Supp.1995). The tests are first administered in the ninth grade, and each student must pass by the end of the twelfth grade as a prerequisite to receiving a diploma:

> On and after September 15, 1998, no nonpublic school chartered by the state board of education, shall grant any high school diploma to any person unless the person has attained at least the applicable scores designated under [s 3301.0710] on all the tests required by [s 3301.0710] . . . .

Ohio Rev. Code Ann. s 3313.612 (Anderson 1994).

Plaintiffs are The Columbus Academy, The Grand River Academy, The Andrews School, and Maumee Valley Country Day School, all private schools in Ohio; Benjamin D. Sommers, a student at Cincinnati Country Day School, and his mother, Marilyn Sawyers Sommers; the Ohio Association of Independent Schools ("OAIS"), an association representing twenty-eight private schools in Ohio; and Douglas W. MacKelcan, chairman of the OAIS and headmaster of The Columbus Academy. On October 18, 1995, plaintiffs brought this action against the governor of Ohio, the Ohio State Board of Education, and various Ohio school officials to enjoin enforcement of §§ 3301.16 and 3313.612. Plaintiffs contended generally that the statutes at issue violated their rights under the First and Fourteenth Amendments to the Constitution.

[1] Plaintiffs also sought declaratory relief and state law remedies.

The district court held a five-day bench trial, at which plaintiffs presented extensive testimony regarding the intrusiveness of the Ohio testing scheme and the degree to which it would "direct" the curricula of private schools. On January 30, 1996, the district court denied plaintiffs' requested relief and dismissed the case. Plaintiffs' motion to this court for injunctive relief pending appeal was denied on February 8, 1996. This appeal followed.

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[1] Plaintiffs also argued that the statutes at issue violated the Tenth Amendment. This argument was briefly addressed by the district court, which correctly dismissed the claim because the Tenth Amendment "cannot be used as foundation for an action against the State based on individual rights." Plaintiffs have abandoned this claim on appeal.

II.

A. Standing

Defendants contend that the OAIS does not have standing to challenge the statutes at issue on behalf of the parents of children attending OAIS schools. Whether a party has standing is a legal question reviewed de novo. *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710, 715 (6th Cir.1995). To establish standing, a party must allege actual or threatened injury, a causal connection between that injury and the defendant's conduct, and a likelihood that a court decision in the plaintiff's favor will redress the injury alleged. *Id.* (citing *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 663-64, (1993)). The plaintiff must also be "a proper proponent, and the action a proper vehicle, to vindicate the rights asserted." *Greater Cincinnati*, 56 F.3d at 715 (quoting *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576 (6th Cir.), *cert. dismissed*, 502 U.S. 1022, (1991)).

An association has standing to assert the rights of its members if its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, (1977); *Greater Cincinnati*, 56 F.3d at 717.

The OAIS member schools clearly have standing in their own right to challenge s 3301.16, the statute which authorizes the revocation of the charters of those schools which fail to meet the testing requirement. That is, the member schools are threatened with actual injury through the loss of their
charters.

The OAIS member schools also have standing to assert the constitutional right of parents to direct their children's education. *See Runyon v. McCrary*, 427 U.S. 160, 175 n. 13, (1976) ("It is clear that the schools have standing to assert these arguments on behalf of their patrons"); *Pierce v. Society of the Sisters*, 268 U.S. 510, 535-36, (1925) (holding that private school could assert rights of potential pupils and

their parents). *See generally Runyon*, 427 U.S. at 178, ("the manner in which [a parent's] child is to be educated" implicates parental interests protected by Roe v. Wade, 410 U.S. 113, 152-53 (1973)). *Accord Parks Sch. of Business, Inc. v. Symington*, 51 F.3d 1480, 1487 (9th Cir.1995) (holding that school had standing to challenge state's refusal to guarantee certain loans to students); *Rothner v. City of Chicago*, 929 F.2d 297, 301 (7th Cir.1991) (citing *Pierce* favorably, noting that "when the interests of the litigant and the third party are closely related, the courts have viewed quite charitably assertions of third-party standing"). The member schools therefore have standing to challenge s 3303.612 on behalf of parents of students who are threatened with the nonreceipt of diplomas.

Consequently, the OAIS itself, as an organization dedicated exclusively to advancing the interests of the member schools, has associational standing to challenge the statutes at issue. *See Hunt*, 432 U.S. at 343.[2]

B. Validity of Testing Requirement for Private Schools

1. *Fourteenth Amendment*

Plaintiffs assert that s 3301.16 impinges on a parent's Fourteenth Amendment right to direct, by choice of school, the education of his or her child. Plaintiffs further contend that the statute violates a fundamental right, requiring this court to apply strict scrutiny in our review. We consider first
the appropriate level of scrutiny.

Challenges to legislation implicating a fundamental right are reviewed with strict scrutiny. *Borman's, Inc. v. Michigan Property & Casualty Guar. Ass'n*, 925 F.2d 160, 162 (6th Cir.), *cert. denied*, 502

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[2] The parties do not contest the lower court's finding that neither Sommers nor his mother had standing. Sommers, who was a senior at Cincinnati Country Day at the time the suit was filed, would never have to take the Ninth Grade Proficiency Test, because the test would be administered only to students entering the ninth grade in 1995 and thereafter.

U.S. 823, (1991). If a fundamental right is not at stake, the statute is generally reviewed for a rational basis. *Id.*

The Supreme Court has held that parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction. *Runyon*, 427 U.S. at 178, (citing *Wisconsin v. Yoder*, 406 U.S. 205, 213, (1972) and *Pierce*, 268 U.S. at 534,). This right is grounded in Fourteenth Amendment liberty interests which include the right to "marry, establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399, (1923). The Supreme Court has applied strict scrutiny to such Fourteenth Amendment claims where they are coupled with a challenge based on the Free Exercise Clause of the First Amendment. *Yoder*, 406 U.S. at 233. Absent a free exercise challenge, however, the Court has applied rational basis review, noting that parents have no constitutional right to "private school education unfettered by reasonable government regulation." *Runyon*, 427 U.S. at 178.

Plaintiffs do not allege violation of the their free exercise rights. Instead, they suggest that strict scrutiny should nonetheless apply where state standards are so intrusive that they effectively eradicate the distinction between private and public education. Plaintiffs cite an Ohio Supreme Court case, *Ohio v. Whisner*, 47 Ohio St.2d 181, (1976), to support their argument. The plaintiffs in *Whisner* challenged the constitutionality of certain minimum standards imposed on both public and private schools by the state. The *Whisner* court held that the standards were invalid because they were

> so pervasive and all-encompassing that total compliance with each and every standard by a non-public school would effectively eradicate the distinction between public and non-public education, and thereby deprive the [ ] appellants of their traditional interest as parents to direct the upbringing and education of their children.

Id. at 768. The Ohio court interpreted *Meyer*, *Pierce*, and *Yoder* to guarantee "the right of a parent to direct the education, *religious or secular*, of his or her children" as a " 'fundamental right' guaranteed by

the due process clause of the Fourteenth Amendment." *Id.* at 769 (emphasis added).[3]

Despite the state court's holding in *Whisner*, no federal court has similarly suggested that wholly secular limitations on private school education implicate a fundamental right warranting strict scrutiny. *See, e.g., Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 899 F. Supp. 1443, 1451 (M.D.N.C. 1995) ("Because Plaintiffs' objection to the Program arises out of *purely secular concerns*, the right asserted by plaintiff parents in this case is not a 'fundamental' right" (emphasis added)), *aff'd*, --- F.3d ---, No. 95-2525, 1996 WL 386531 at *5 (4th Cir. July 11, 1996).

Even assuming that *Whisner* states a correct proposition, we are not persuaded that the testing required by s 3301.16 effectively eradicates the difference between public and private schools. The district court's factual findings, which we conclude are not clearly erroneous, indicate that the NGPT requirement places minimal limitations on private schools' latitude to operate independently. The tests require several hours per day over a five day period to administer. The state pays the schools an additional fifty dollars per student to administer the tests. The state does not require any specified level of preparation for the tests. Moreover, the material tested is already required to be taught by state minimum standards which plaintiffs do not contest. Under these circumstances, we fail to see how the testing requirement threatens to completely transform private schools into public ones. Thus, a
rational basis review, not strict scrutiny, governs our inquiry.

We now turn to the merits of plaintiffs' argument. To prevail, plaintiffs must show that s 3301.16 is not "rationally related to a legitimate governmental interest." *Lyng v. International Union*, 485 U.S. 360, 370, (1988); *Muller v. Lujan*, 928 F.2d 207, 209 (6th Cir.1991) (quotation omitted). The state clearly has an interest in ensuring that certain minimum educational standards are met. *See, e.g., Board of Educ. v. Allen*, 392 U.S. 236, 245-46, (1968) (state may insist that private

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[3] Alternatively, the *Whisner* court held that the standards at issue impinged upon the free exercise right of parents of students attending a private religious school. *Ohio v. Whisner*, 351 N.E.2d 750, 767 (Ohio 1976).

schools "provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction"). Plaintiffs must therefore show the absence of a rational relation, by establishing that it is impossible for the state to demonstrate any reasonable basis for its action. *Borman's*, 925 F.2d at 162.

Plaintiffs have failed to satisfy their burden. In light of the state's interest in education, a reasonable basis exists for utilizing a testing requirement to ensure that students from both public and private schools meet certain basic standards. Plaintiffs have not demonstrated that the testing requirement would require such extensive preparation that it would substantially encroach upon plaintiffs' discretion to design their own curricula. We therefore conclude that the secular testing requirement imposed by §§ 3301.16 and 3303.612 [4] does not constitute unreasonable regulation of private education. *See Runyon*, 427 U.S. at 179, (noting that state may reasonably regulate all schools, and has the power to "inspect, supervise and examine them, their teachers and pupils . . ." (citing *Pierce*, 268 U.S. at 534,). The district court correctly denied relief to plaintiffs on their Fourteenth Amendment claim

We acknowledge that in some situations, state-imposed testing requirements could be so intrusive that they could potentially displace private schools' discretion to fashion their own educational programs and focus on subjects deemed to be of particular importance. This is not such a case. Here, the tests require ninth-graders to demonstrate basic proficiency in reading, writing, mathematics, science, and citizenship. The examinations do not address areas vulnerable to more subjective interpretations such as history, sociology, political science, art, or literature, reinforcing our conclusion that the testing requirement is a reasonable regulation of private education.

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[4] Section s 3303.612, which prohibits the issuance of diplomas to students who have not passed the test, acts as another mechanism to enforce the testing requirement. Because we agree with the district court that s 3301.16 is constitutional, s 3303.612 is also valid and we decline to address it in further detail.

2. *First Amendment.*

Plaintiffs also claim that s 3301.16 violates their right to freedom of speech and association guaranteed by the First Amendment. Plaintiffs allege that the testing requirement impermissibly requires them to alter their school calendars and curricula. The district court found that even if OAIS schools choose to alter their curricula in response to the testing requirement, plaintiffs' free speech rights are not violated because the statute does not restrict the teaching of any particular material.

We agree with the district court that plaintiffs' First Amendment claim is without merit. The testing requirement in no way restricts plaintiffs from teaching any particular subjects, nor does it limit the manner in which they may teach the material. Plaintiffs' First Amendment free speech claim cannot survive absent an indication that their speech has been constrained. Cases cited by plaintiffs in support of their argument are distinguishable in that each involved affirmative restrictions on speech. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, (1957) (overturning contempt conviction of college professor who refused to answer questions submitted by state attorney general regarding the content of the professor's lectures); *Keyishian v. Board of Regents*, 385 U.S. 589, (1967) (invalidating statutory scheme authorizing removal of faculty members for seditious utterances). Accordingly, we conclude that the district court did not err in denying relief to plaintiffs pursuant to the First Amendment.

III.

For the foregoing reasons, the order of the district court denying relief and dismissing the case is **AFFIRMED**.

UNITED STATES DISTRICT COURT
Southern District of Ohio

OHIO ASSOCIATION OF INDEPENDENT SCHOOLS, et al
JUDGEMENT IN A CIVIL CASE

Case No. C-1-9 5-907

vs

JOHN GOFF, et al

Judge Herman J. Weber
Magistrate Judge Steinberg

[] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT judgement is entered in favor of the Defendants and against Plaintiffs. All federal claims are DISMISSED WITH PREJUDICE at Plaintiffs' costs. All state claims, if any are DISMISSED WITHOUT PREJUDICE. The Clerk of Court is directed to release and return to the Defendants the tests previously placed under seal in this case. This case is terminated on the docket of this Court.

Date: January 30, 1996

Kenneth J. Murphy, Clerk

s/
By/Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

OHIO ASSOCIATION OF INDEPENDENT SCHOOLS, *et al.*,

Plaintiffs

v. C-1-95-907

JOHN GOFF, *et al.*,

Defendants

ORDER

This action for injunctive relief was filed on October 18, 1995 by Plaintiffs Ohio Association of Independent Schools ("OAIS"), the Columbus Academy, Douglas W. MacKelcan, Jr., The Grand River Academy, The Andrews School, Maumee Valley Country Day School, Marilyn Sawyer Sommers, and Benjamin D. Sommers against John Goff, the Superintendent of Public Instructions, George Voinovich, the Governor of Ohio, and some members of the State Board of Education ("Defendants").

Plaintiffs seek to enjoin the enforcement of Ohio Revised Code ("R.C.") §§ 3301.16 and 3313.612. Plaintiffs allege entitlement to this relief because the statutes and their implementation by the Ohio Board of Education unconstitutionally infringe their rights guaranteed by the First, Tenth, and Fourteenth Amendments to the Constitution of the United States. They also allege violations of the state law.

Specifically, Plaintiffs seek an injunction preventing Defendants from revoking the charter of any non-public school or refusing to grant a charter to any non-public school that fails or refuses to administer or participate in the testing prescribed by division (D) of § 3301.0710 or awards a diploma after September 15, 1998 to any student who has not satisfied the testing requirements of the State Board of Education.

On October 18, 1995, Plaintiffs initiated this action by filing a Complaint for Injunctive Relief; Claim of Unconstitutionality and Motion and Memorandum in Support for Temporary Restraining Order and Preliminary Injunction enjoining the Defendants from mandating OAIS schools administer the Ninth Grade Proficiency Test ("NGPT"). On November 8, 1995, Defendants filed a Motion to Dismiss (doc. no 13) asserting that Plaintiffs did not have a constitutional claim. On November 29, 1995, Plaintiffs filed a Memorandum In Opposition (doc. no. 15) and Defendants filed a Reply to the memorandum in opposition (doc. no. 23). In the interim, this Court ordered with the parties' agreement that the scheduled NGPT be administered, but that the tests administered by the Plaintiff schools be kept under seal until the disposition of this case. This Court set this case for trial on January 4, 1996.

The Defendants argued in their Motion to Dismiss (doc. no. 13) that the complaint fails to state a claim upon which relief can be granted where (1) no constitutional right exists under the First and tenth Amendments that relates to Plaintiffs' claims and (2) R.C. § 3301.16 does not interfere with a parents' limited right, if any, to direct the secular education of his or her children secured by the Fourteenth Amendment. The Court with the agreement of the parties reserved judgment on the Motion to Dismiss until the conclusion of the trial. The trial on the merits was held in January, 1996.

After consideration of the evidence and arguments submitted during the trial of the case by the parties, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT:

1. The OAIS is an association, organized under the laws of the State of Ohio, that represents the interests of twenty-eight (28) member (and two associate) schools. The principal place of business of the OAIS is in the County of Clermont, State of Ohio.

2. The Columbus Academy is a not-for-profit corporation, organized under the laws of the State of Ohio, is a member school of the OAIS, is a chartered non-public school by the State of Ohio, and has its principal place of business in the County of Franklin, State of Ohio.

3. Douglas W. MacKelan, Jr., is the headmaster of The Columbus Academy, is the Chairman of the Ohio Association of Independent Schools, and is resident of the County of Franklin, State of Ohio.

4. The Grand River Academy is a not-for-profit corporation, organized under the laws of the State of Ohio, is a member school of the OAIS, is a chartered non-public school by the State of Ohio, an has its principal place of business in the County of Mahoning, State of Ohio.

5. The Andrews School is a not-for-profit corporation, organized under the laws of the State of Ohio, is a member school of the OAIS, is a chartered non-public school by the State of Ohio, and has its principal place of business in the County of Lake, State of Ohio.

6. The Maumee Valley Country Day School is a not-for-profit corporation, organized under the laws of the State of Ohio, is a member school of the OAIS, is a chartered non-public school by the State of Ohio, and has its principal place of business in the County of Lucas, State of Ohio.

7. The State of Ohio enacted R.C. §§ 3301.16 and 3301.612.

8. Governor George Voinovich is the Governor of the State of Ohio and is the chief of its executive branch.

9. Defendant John Goff is the Superintendent of Public Instruction and thereby the executive and administrative officer of the State Board of Education. By statute, he is charged with executing the educational policies, orders, directing the work of all persons employed in the State Department of Education.

10. The individual Defendants, other tan John Goff and George V. Voinovich, are current members of the State Board of Education.

11. In 1987, the Ohio general assembly enacted House Bill 231, mandating the establishment of a statewide testing program that requires students attending public high schools to pass a proficiency test as a condition of graduation, commencing in 1994.

12. Prior to that time, no students in the State of Ohio were required to pass a proficiency test in order to obtain a diploma. After that date, only public school students were required to pas a proficiency test in order to obtain a diploma. After that date, only public school students were required to pass the test to achieve a diploma.

13. Effective July 1995, the State of Ohio made the administration of a statewide proficiency test a requirement for obtaining and

maintaining a State Charter by non-public schools. The Charter certifies that parents and children who use chartered non-public schools comply with the compulsory attendance laws of Ohio.

14. To implement the legislation, the State Board of Education has established five statewide proficiency tests and determined and designated the score on such tests tat shall be deemed to be at least a ninth grade level of literacy and basic competency.

15. The testing program the State Board of Education has devised is based upon the subject areas required by the state minimum standards. These subject areas, required by the minimum standards, are included in the curriculum of the OAIS member schools.

16. In 1987, the Ohio Department of Education with the involvement of the education community, began a massive effort to develop the educational outcomes that the Ninth Grade Proficiency Test would measure, as well as to develop the test itself.

17. Initially, chartered non-public schools had the option to participate in the NGPT but were not required to do so.

18. From the imposition of the testing requirement to the present, the OAIS school administrations apparently believed that the Plaintiffs would not be required to administer the NGPT.

19. Relying on this belief, the schools declined offers to participate in the creation and review of the NGPT.

20. In 1993, however, the Ohio General Assembly enacted O.R.C. §§ 3301.16 and 3313.612. Section 3301.16 Provides:

> Pursuant to standards prescribed by the State Board of Education as provided in division (D) of §3301.07 of the revised code, the State Board shall classify and charter school districts and individual schools within each district except that no charter shall be granted to a non-public school, unless pursuant to division (K) of §3301.0711 of the revised code, the school elects to administer the test prescribed by division (D) of §3301.0710 of the revised code beginning July 1, 1995. The State Board shall revoke charter of any school district or school which fails to meet the standards for elementary and high schools as prescribed by the Board. The State Board shall also revoke the charter of any non-public school, that does not comply with §3313.612 of the revised code or, on or

> after July 1, 1995, does not participate in the testing program prescribed by division (D) of §3301.7010 of the revised code. In the issuance and revocation of school district or school charters, the State Board shall be governed by provisions of Chapter 119 of the revised code.

Section 3313.612 Provides:

> On and after September 15, 1998, no non-public school chartered by the State Board of Education, shall grant any high school diploma to any person unless the person has attained at least the applicable scores designated under division (B) of Section 3301.0710 of the Revised Code on all the tests required by that division....

21. Thus, in July 1993, the previous option to administer the test became mandatory, and non-public schools were required to: (a) starting in 1998, not grant a high school diploma unless the graduate has achieved a passing score on the NGPT; and (b) starting in October 1995, administer the NGPT to their students.

22. Should an Ohio non-public school fail to comply, its charter will be revoked (or will not be granted) by the State Board of Education.

23. While it would appear that a non-public school could operate without a charter, the effect would be disastrous in most instances. The school would lose administrative cost reimbursement provided pursuant to R.C. §3317.063, auxiliary services provided pursuant to R.C. §3317.06, and public transportation as provided by R.C. §3327.01. Additionally, the school would lose other important advantages such that operation would be difficult or impossible.

24. Students attending a non-chartered (and non-religious) school would most probably violate the state compulsory education and school attendance laws. The State of Ohio, in common with other states, requires compulsory attendance for its children between the ages of six and eighteen. Parents of school-age children are charged with the duty to cause their child's attendance at a school. R.C. §3321.03. Failure to do so results in criminal sanctions. R.C. §§3321.38 and 3321.99. For purposes of the compulsory education statute, a "school" is a school chartered by the state or a special education program. Probably, if the

charter of a member school were forfeited to avoid the testing requirement, it would not qualify under any of the exceptions to the legislation. Therefore, parents who elected to continue their child's education at such an institution would be subject to criminal sanction.

25. No OAIS school began any special preparation of its students, in the fall of 1993, to take the NGPT even though the legislation had been passed in July, 1993. The schools teach in their curriculum the subjects of English language arts, mathematics, science, social studies, American history and American government as required by the state minimum standards.

26. In January, 1988, the Ohio Department of Education contacted various professional educational associations, selected superintendents, and other sources for the names of individuals who could serve on four work groups charged with developing a draft list of ninth grade learner outcomes in reading, writing, mathematics, and citizenship.

27. The work groups formed by the Department met regularly between January and June of 1988 to identify information for inclusion on the learning outcomes considered to be ninth grade competencies that would be important enough to require of every student who earns a diploma.

28. In July 1988, the Department distributed draft lists of ninth grade learning outcomes to every school district and to representatives of various other groups of Ohio citizenry, including the Ohio Association of Independent Schools, as well as four thousand business, civil rights, community, education, government, and labor leaders for their review and comments. the draft lists were also reviewed by an Ad Hoc Task Force, Ohio Department of Education curriculum specialists, and the Testing Steering Committee, an existing oversight group of district testing directors, administrators, psychologists, and counselors.

29. In September 1988, enough draft copies of the ninth grade learning outcomes for every teacher were distributed to all public and non-public schools in the state, including those schools who are members of OAIS, and eight regional forums were conducted to offer Ohio citizens an opportunity to comment on the appropriateness of the proposed outcomes.

30. In November 1988, the State Board of Education adopted these ninth grade learning outcomes after receiving comments from teachers, schools, concerned citizens, and other organizations.

31. The ninth grade learning outcomes represent a basic level of academic knowledge and skill that the Ohio Department of Education has determined all Ohio students should master by the ninth grade. The outcomes are based on the subject areas required to be taught by the state minimum standards.

32. Beginning in December 1988, and continuing through the Spring of 1990, the ninth grade learning outcomes were distributed to students, teachers, and administrators in all public and non-public high schools in Ohio.

33. In January 1989, the Department formed several review panels to assist in the development of the Ninth Grade Proficiency Test specifications including a Bias Review Panel, content panels for each subject to be tested, and a Technical Advisory Panel.

34. The NGPT is designed to measure whether or not students can demonstrate a basic level of academic knowledge and skill.

35. Selected Ohio educators and appropriate curriculum consultants in the Department developed test specifications and test item specifications associated with each ninth grade learning outcome. These specifications were reviewed by a subcommittee, by the Bias Review Panel, by the Technical Advisory Committee, and by the Testing Steering Committee.

36. In March 1989, the Department issued a Request for Proposal ("RFP") for development of the Ninth Grade Proficiency Test. The RFP called for the contractor to develop, review, revise, field test, and select test items for the first four forms of the Ninth Grade Proficiency Test. Proposals were reviewed by an Ad Hoc Committee composed of selected members of the Bias Review Panel, the Testing Steering Committee, and the Technical Advisory Committee. The proposal with the lowest bid that met all of the RFP requirements was selected.

37. Test questions and writing prompts were developed by IOX Assessment Associates ("IOX") of Los Angeles, California.

38. All developed items were submitted to the Department of Education for review by test development specialists and curriculum consultants. The content committees that reviewed the items were asked

to review each item with respect to this appropriateness, adequacy of preparation, and bias.

39. Test items that survived the first set of reviews were field tested in December 1990. After the field test data became available, the test items were reviewed again b the Bias Review Panel and the respective content committees. Test items that were determined to be unfair or to contain a content flaw were eliminated from the bank of test questions. A second field test was administered to try out the test questions contained in Forms C and D.

40. Other test questions have been field tested by embedding them in forms of the NGPT that have actually been administered.

41. From the pool of test items used in the first field test that were approved by the Department, the Bias Review Panel, and the appropriate content committees, IOX constructed two equivalent forms of the Ninth Grade Proficiency Test that were scheduled for use in November 1990 (Form A) and in March 19912 (Form B).

42. The equivalency of Forms A and B was based on the same content specifications and approximately equal item difficulties. Approximately fifteen items in each of the multiple choice tests were common items used in both forms to be used for final equating of the forms. Prior to final publication, the two forms were reviewed by the Department staff to ensure that each test met the test specifications approved by Ohio educators and that only question approved by the content review and bias review committees were included.

43. Forms C and D of the NGPT, and all other forms used by the Department were developed by the same process used to develop forms A and B.

44. The learning outcomes for the Science portion of the NGPT and the test items for the Science portion of the test were developed pursuant to the same standards and processes as the first four sections of the test.

45. Writing prompts, used for the writing portion of the NGPT, were also developed by IOX. These prompts were reviewed by the Department, the Bias Review Panel and the Writing Content Committee. The writing prompts were field tested in December 1989.

46. The extensive test development and design procedures were employed by the Ohio Department of Education to assure that the NGPT

accurately measures whether or not students can demonstrate a basic level of academic knowledge and skill.

47. The State already imposes a broad range of minimum standards on chartered non-public schools, including OAIS schools. The minimum standards require the teaching of English language arts, mathematics, science, social studies, American history, and American government as minimum graduation requirements.

48. The member schools of the OAIS, to meet the requirements of the minimum standards of the state, currently must offer a specified number of classes in each of the subject areas tested on the NGPT.

49. The OAIS schools do not argue that these minimum standards violate their Fourteenth Amendment right, if any, to direct the upbringing and education of their children. They argue that the requirement that they administer the NGPT to their students burdens their school calendar and requires changes in their curriculum.

50. Students at the OAIS member schools are already among the most rigorously tested anywhere in the country. The OAIS schools are chartered as college preparatory schools by the state, and administer standard college admissions tests annually to their students. The median SAT verbal score for the OAIS schools' students for the classes of 1994 and 1995 was 585; the median math SAT was 635. Ninety-nine point four (99.4%) of OAIS school graduates matriculate to accredited four-year colleges every year.

51. The NGPT is inconsistent with the tests normally employed by the OAIS member schools. The NGPT is designed to test minimum competency. OAIS schools employ tests which are designed to challenge students to reach for maximum results. The schools choose to administer these specific tests which are designed to challenge students to reach for minimum results. The schools choose to administer these specific tests as they form an integral part of their goal to provide results that are informative about each student's progress and academic posture.

52. In times ranging from January, 1995 to September, 1995, the OAIS member schools began to view the taking of the NGPT as inevitable.

53. Interference with each individual school's calendar and curriculum to prepare for the test varied depending upon the determination made by that school. The degree of interference with the

school calendar and curriculum of the individual schools rested in the discretion of the individual schools except for the time required to administer the test. The administration of the test required 2 1/2 hours for each test. One test was required to be given per day. The state increased its payment to the schools by $50.00 per student to cover the administrative costs of the test.

54. The OAIS member schools, in test scores, student performance, and college admissions demonstrate that they provide a high quality education to their students. The curricula of the OAIS member schools contain the academic subjects required by the state minimum standards. During their educational experience, students attending Plaintiff schools are taught the subject areas tested by the NGPT. At least by their twelfth year, every student of an OAIS member school presently is taught the subject matter required to successfully pass the NGPT. This Court conclude that by the time of their eighth grade experience, they are taught the information required to pass the NGPT by OAIS member schools' present curricula.

55. The OAIS member schools do not issue diploma. They issue internal documents verifying a student has completed the curriculum offered by the school. This verification has universally been accepted by colleges and universities as meeting the entrance requirements of all colleges and universities.

56. To the extent that any of the foregoing Findings of Fact contain any conclusions of law, they shall to that extent be deemed Conclusions of Law, and to the extent any of the following Conclusions of Law contain any findings of fact, they shall to that extent be deemed Findings of Fact.

CONCLUSIONS OF LAW:

I. JURISDICTION

1. This Court has jurisdiction pursuant to the First and Fourteenth Amendments of the United States Constitution.

2. The Eleventh Amendment does not bar a suit against a state official for prospective injunctive relief when a federal law violation is alleged. ***Brinkman v. Gilligan***, 610 F.Supp. 1288, 1292 (S.D. Ohio 1985).

II. STANDING

3. The standing question is whether the plaintiffs have "alleged such a personal stake in the outcome of the controversy" as to warrant the invocation of federal court jurisdiction and to justify the exercise of the Court's remedial powers on Plaintiffs' behalf. ***Baker v. Carr***, 369 U.S. 186, 204 (1962). The Article III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiffs themselves have suffered "some threatened or actual injury resulting from the putatively illegal action. . . " ***Linda R.S. v. Richard D.***, 410 U.S. 614, 617 (1973).

4. Moreover, the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Article III's minimum requirements, serve to limit the role of the courts in resolving public disputes. ***Warth v. Seldin***, 442 U.S. 490, 500 (1975).

5. As accurately described by the Plaintiffs in their Trial Brief (doc. no. 34), the injury complained of is the threatened revocation of the charters of the OAIS member schools and the effect on the schools' calendar and curricula occasioned by the putatively illegal imposition of the duty upon them to administer the NGPT. While others may collaterally benefit from a ruling in favor of the member schools, the injury complained of would occur to the schools, as described in more detail in the Findings of Facts (paragraphs 22 through 24). The statutes at issue direct the sanctions at the school. The loss of the state charter is a death knell for Plaintiff schools. Without the Plaintiff schools, OAIS would too meet its demise.

6. Plaintiffs' prayer for relief is to enjoin the state from revoking the charter of an OAIS member school if it refuses to administer the

NGPT or awards a diploma despite the failure of a student to attain the required grade on the NGPT.

7. Accordingly, based on the facts as alleged and presented at trial, the Court finds that the OAIS member schools have standing to attack the validity of the state actions threatened against them in this case.

8. Plaintiff-schools do not have standing to assert that R.C. 3301.16 and R.C. 3313.612 infringe upon the constitutional rights of other non-public schools or of parents to direct their children's secular education. ***See Warth v. Seldin***, 422 U.S. 490, 498, 45 L.Ed. 2d. 343, 95 S.Ct. 2197, 2205 (1975).

9. As an association, OAIS does not have standing to assert claims that its members do not have standing to pursue. ***Hunt v. Washington Apple Advertising Comm'n***, 432 U.S. 333 (1977). OAIS's members do not have standing to assert the constitutional rights of individual parents or non-member schools. Thus, OAIS likewise lacks standing to assert these parents' rights or the rights of non-member schools.

10. Plaintiff Douglas W. MacKelcan, Jr., as a school director, does not have standing to assert that R.C. § 3301.16 and R.C. § 3313.612 infringe upon the constitutional rights of parents to direct their children's secular education. ***See Warth v. Seldin, supra.***

11. Plaintiff Benjamin D. Sommers, Currently a senior, does not have standing to assert that R.C. § 3301.16 and R.C. § 3313.612 violate his constitutional rights because he is not required to participate in the administration of the Ninth Grade Proficiency Test.

12. Plaintiff Marilyn Sommers, parent of Plaintiff Benjamin D. Sommers, does not have standing to assert that R.C. § 3301.16 and R.C. § 3313.612 violate her constitutional rights because her son will not be subject to the requirements of R.C. §§ 3301.16 and 3313.612 and she does not participate in the administration of the test.

13. Accordingly, these individual Plaintiffs lack standing to assert the claims set forth in the complaint that are standing to assert the claims set forth in the complaint that are specifically based upon individual constitutional rights. The OAIS schools do not issue diplomas. They, thus, suffer no injury from enforcement of R.C. § 3313.612 and have no standing. This Court, therefore, is without jurisdiction to entertain their claims and the Motion to Dismiss is GRANTED as to Douglas W. MacKelcan, Jr. As an individual, Benjamin D Sommers, and Marilyn

Sommers and the claims by OAIS and its member school to enjoin the enforcement of R.C. 3313.612.

III. FIRST AMENDMENT CLAIM

14. The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . ."

15. Plaintiffs have asserted that R.C. § 3301.16 impermissible infringes upon their freedom of speech because the statute allegedly requires them to alter their school calendar and their curricula. Plaintiffs do not claim that the NGPT violates their rights to Free Exercise of religion or violates the Establishment Clause.

16. Plaintiffs' rights to free speech and association are not implicated by a statute that requires non-public schools to administer the Ohio NGPT.

17. R.C. § 3301.16 does not require chartered non-public schools to alter their curricula. R.C. § 3301.16 requires only that chartered non-public schools administer the NGPT. This is the only new requirement currently imposed upon Plaintiff schools as a condition to retain their charters.

18. If OAIS member schools choose to alter their curricula in response to R.C. § 3301.16, that fact does not establish that R.C. § 3301.16 infringes upon the First Amendment rights of any of the Plaintiffs to this action. This statute in no way restrains a school or its instructors from teaching any subject or any viewpoint regarding a particular subject so long as the schools administer the NGPT.

19. In ***Sweezy v. New Hampshire***, 354 U.S. 234, 250, 1 L.Ed.2d. 1311, 1325, 77 S.Ct. 1203 (1957), the Court addressed the First Amendment rights of a lecturer who had been adjudged in contempt of court during an investigation pursuant to the New Hampshire Subversive Activities Act. In ***Keyishian v. Board of Regents of New York***, 385 U.S. 589, 17 L.Ed. 2d. 629, 87 S.Ct. 675 (1967), state employees filed a declaratory judgment action to challenge New York statutes and regulations that: (1) prohibited state employment of any person who had advocated the forceful overthrow of government; (2) authorized the

removal of faculty members for seditious utterances; and (3) established Communist Party membership as prima facie evidence that a person was not qualified for state employment.

20. Sweezy and Keyishian both involved regulations that directly punished individuals for engaging in certain forms of political speech. In this case, the Court concludes that nay curricula alteration the schools decide to make rests entirely within their discretion, that their curricula already includes the subject areas required by the state minimum standards, and that the NGPT tests the skills and knowledge inculcated by teaching the subject areas required by the minimum standards and does not restrain Plaintiffs from teaching any other subject area.

21. Accordingly, R.C. 3301.16 does not violate Plaintiffs' constitutional rights under the First Amendment.

IV. TENTH AMENDMENT

22. The Tenth Amendment to the U.S. Constitution states that "[the powers not delegated to the United States by the Constitution, nor prohibited by it to the Sates, are reserved to the States respectively, or to the people." The Tenth Amendment was intended to confirm that powers not granted to the federal government were reserved tot he States or the people, in order to allay fears that the national government might seek to exercise powers not expressly granted to it by the U.S. Constitution. ***U.S. v. Sprague***, 282 U.S. 716, 75 L.Ed. 640, 51 S.Ct. 220 (1931). The Tenth Amendment "states but a truism that all is retained which has not been surrendered." ***U.S. v. Darby Lumber Co.***, 312 U.S. 100, 124, 85 L."Ed. 609, 61 S.Ct. 451 (1941). See also, ***New York v. U.S.***, 505 U.S. 144, 120 L.Ed. 120, 137, 112 S.Ct. 2408 (1992).

23, The Tenth Amendment does not operate as a limitation upon the powers of the State not grant specific constitutional rights to individuals. The Tenth Amendment cannot be used as a foundation for an action against the State based on individual rights, particularly when the State is exercising its reserved power to further its legitimate interest in the education of its children. The Distribution of the power reserved to the State and the People is a matter of state law.

24. Accordingly, the Plaintiffs have no federal claim under the Tenth Amendment.

V. FOURTEENTH AMENDMENT CLAIM

25. The Court accepts the general rule that the courts will acquiesce in the legislative decision unless it is clearly erroneous, arbitrary, or wholly unwarranted. The constitutionality of a law is, therefore, not to be determined on a question of fact to be ascertained by the Court because the courts will not make a separate investigation of any facts or attempt to decide whether the legislature has made a correct conclusion with respect to them.

26. Plaintiffs have cited several cases including ***Wisconsin v. Yoder***, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), to support their claim that R.C. § 3301.16 should be subject to strict scrutiny analysis. Although Yoder utilized strict scrutiny, it is clear that the Court did so because the parents' free exercise rights were implicated.

27. As the Supreme Court of Ohio has stated "'when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record (individual criminally convicted for the following sincerely held religious beliefs), more than merely a 'reasonable relation to some purpose within the competency of the state' is required to sustain the validity of the state's requirement under the First Amendment.' What is required is a finding 'that there is state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.'" ***State v. Whisner***, 47 Ohio St.2d 181, 217 (quoting extensively from ***Wisconsin v. Yoder***, 406 U.S. 205, 214, 233).

28. These cases do not support the application of strict scrutiny to a case involving a statute that does not implicate a parents' First Amendment rights.

29. Section 1 of the Fourteenth Amendment to the U.S. Constitution provides in relevant part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

30. Plaintiffs claim that R.C. § 3301.16 infringes upon the liberty interests of parents, guaranteed by the Fourteenth Amendment, "to direct the upbringing and education, secular or religious, of their children."

State v. Whisner, 47 Ohio St.2d 181,351 N.E.2d 750 (1976). Plaintiffs have not, however, alleged or argued that R.C. § 3301.16 interferes with the religious education of their students. Plaintiffs assert only that R.C. § 3301.16 interferes with the secular education of their children. Where the only issue involves the secular education of their children, a court conducts rational basis review and the State's regulation need only be reasonably related to a legitimate goal. ***Herndon v. Chapel Hill-Carrboro City Board of Education***, 899 F. Supp. 1443 (M.D.N.C. 1995); ***See also Meyer v. Nebraska***, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); ***Pierce V. Society of Sisters***, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed 1070 (1925) (Both applying rational basis review to a Fourteenth Amendment claim). Under the rational basis test, challenged legislation that "is rationally related to a legitimate governmental interest must be upheld." ***Lyng v. International Union, UAW***, 485 U.S. 360, 370, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988).

31. Accordingly, Plaintiffs in order to prevail on the merits in this case must demonstrate that R.C. § 3301.16 does not bear a rational relationship to a legitimate state interest.

32. The validity of the NGPT requirement is governed by the same standards as other state regulation of private education, such as compulsory attendance or minimum standards.

33. Private schools have a constitutional right to exist and parents have a constitutional right to send their children to such schools. ***Pierce v. Society of Sisters***, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed 1070 (1925). The state has a right to regulate such schools in the public interest under the police power. ***Meyer v. Nebraska***, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed.1042 (1923). The state's interest in making certain that its children receive an adequate education must be balanced against the parents' fundamental rights and interests in directing the upbringing of their children. ***Wisconsin v. Yoder, supra.***

34. State minimum standards which are so comprehensive in scope and effect that any distinction between public and non-public education is effectively eradicated "abrogates [parents'] fundamental freedom, protected by the liberty clause of the Fourteenth Amendment to the Constitution of the United States, to direct the upbringing and education, secular or religious, of their children." ***State v. Whisner***, 47 Ohio St.2d 181, 351 N.E.2d 750 (1976) (emphasis added.)

35. The NGPT is an "exit" test.

36. The United States Court of Appeals for the Fifth Circuit examined Florida's "exit" testing requirements in ***Debra P. v. Turlington***, 644 F.2d 397 (5th Cir. 1981). The court held that the exit test was constitutionally prohibited unless the state demonstrated the "curricular validity of the test." The Court held, however,

> "We do not question the right of the state to condition the receipt of a diploma upon the passing of a test so long as it is a fair test of that which was taught. Nor do we seek to dictate what subjects are to be taught or in what manner. We do not share appellants' fear that our decision would prevent new items from being added to the curriculum. Those decisions would properly be left with the school authorities.

37. As the United States Supreme Court said in ***San Antonio School District v. Rodriguez***, 411 U.S. 1,43, 93 S.Ct. 1278, 1302, 36 L.Ed.2d 16, 49 (1972):

> The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that would circumscribe or handicap that continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

38. Just as a teacher in a particular class gives the final exam on what he or she has taught, so should the state give its final exam on what has been taught in its classrooms. **Debra P.**, 644 F.2d at 406.

39. [H]aving a functional literacy examination bears a rational relation to a valid state interest . . . If the test is not fair, it cannot be said to be rationally related to a state interest. **Debra P.**, 644 F.2d at 406.

40. Following the logic of **Debra P.**, by imposing the test on the subject areas required to be taught in non-public schools by the minimum standards, the State of Ohio has given its final exam on the subject areas it has required by taught in the classrooms of the non-public schools.

41. The imposition of the administration of the NGPT upon non-public schools is valid, that is, the test tests that which is presently being taught in the OAIS schools' curricula in grades K through 12.

42. There is no evidence that test is not fair. The issue of whether the NGPT meets the standard of "fairness" espoused in **Debra P.** must be left for another day.

43. In applying the balancing test analysis the Court must consider the state's interest and how the NGPT advances that interest against the non-public schools' interest in maintaining independence of state regulations and control of calendar and curricula.

44. The state interest advanced by the State of Ohio for imposing the NGPT on non-public schools is to ensure that non-public students learn the subject areas required by the state minimum standards. The Ohio and United States Supreme Courts have recognize such a state interest.

45. The Court in ***Murphy v. Arkansas***, 852 F.2d 1039, 1042 (8th Cir. 1988) discussed the fundamental importance of education in terms of success and achievement, noting that it was "further underscored by the Court in ***Brown v. Board of Education***, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed 873 (1954), where it stated,

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed force. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity, where the state has undertaken to provide it, is a right which must be made available to all on an equal terms.

Following from these recognized concerns, the Supreme Court has observed that

> a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, by at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction.

Board of Education v. Allen, 392 U.S. 236, 245-46, 88 S.Ct. 1923, 1927-28, 20 L.Ed. 2d 1060 (1968) (footnote omitted).

Murphy, 852 F.2d at 1042.

46. If the State must satisfy its interest in secular education through the manner in which those schools perform their secular function. ***Murphy***, 852 F.2d at 1042 N.4 (quoting ***Allen***, 392 U.S. at 246-47, 88 S.Ct at 1928).

47. [I]t is "settled beyond dispute, as a legal matter, that the state has a compelling interest in ensuring that all its citizens are being adequately educated." ***Murphy***, 852 F.2d at 1042.

48. In ***Runyon v. McCrary***, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), the Supreme Court stated:

> The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer a specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation. . . Indeed, the Court in Pierce expressly acknowledged "the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and their pupils."

427 U.S. at 178, 96 S.Ct. at 2598 (citations omitted).

49. The state must have a mechanism by which it can confidently and objectively be assured that its citizens are being adequately educated. ***Murphy***, 852 F.2d at 1042.

50. The NGPT does not require the OAIS member Schools to Revise curriculum rather it tests whether the subject areas required by the minimum standards have been learned by students. The NGPT is an

appropriate way to determine whether the subject area required by the existing minimum standards imposed on non-public schools by OAC § 3301-35-04 have been learned by the students.

51.[O]ur job is not to sit as a legislature and the constitutional standard of rationality under the equal protection clause is a relaxed one. In this area of the law, the Supreme Court has declared its willingness to uphold any classification based "upon [any] state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy. . ." ***Murphy***, 852 F.2d at 1044 (quoting ***Allied Stores v. Bowers***, 358 U.S. 522, 530, 79 S.Ct. 437, 443, 3 L.Ed.2d 480 (1959)).

52. R.C. § 3301.16 ensures that each non-public student learns the basic skills that non-public students are required to learn by the state minimum standards. This is certainly a laudatory and a legitimate state goal, and one that has not been disputed by Plaintiffs.

53. The Court finds that the NGPT does advance the important state interest in the manner in which non-public schools perform their secular functions. ***Pierce v. Society of Sisters***, 268 U.S. 510 at 246-47 (12925).

54. The Court further finds that R.C. 3301.16 is a constitutional exercise of the State of Ohio's authority to impose reasonable regulations upon the non-public schools of this State. See ***State ex rel. Nagle v. Olin***, 64 Ohio St.2d 341, 354 (1980) (state has authority to prescribe subjects of instruction at non-public schools). ***See also Runyon v. McCrary***, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976).

55. The burden the state places on the plaintiff schools is the administration of the test. The administration of the test requires 2 1/2 hours per day for five days. Any additional inconvenience, loss of time, or adjustment of curriculum are completely at the discretion of the OAIS schools and are not required by the statute.

56. The fact that 95% of the students of the OAIS' member schools attend degree granting institutions is not relevant to whether R.C. § 3301.16 is reasonably related to Ohio's goal of insuring that each child in Ohio receives at least an adequate education. R.C. § 3301.16 is reasonable related to the State's interest in protecting all students, whether or not they go on to degree granting institutions or leave the non-public schools to enter the public school systems.

57. Furthermore, the statute is rationally related to the State's interest in ensuring that all of its students, including all of its non-public students, attain a knowledge of the subject areas required by the state minimum standards.

58. The NGPT is a reasonable safeguard to ensure the non-public school students have learned the materials and skills in the subject areas required to be taught by the state minimum standards.

59. Requiring the non-public schools to administer the test in the schools the students attend for which the schools are reimbursed at present $50.00 per students is the least restrictive method to administer the test. The other method suggested by Plaintiffs at trial is the continuation of the state inspections. Other alternatives were considered before trial but were rejected by one or the other of the parties. (See Exhibit B). There is no indication in the evidence that the inspections determined in any manner whether the students learned the skills and materials in the subject areas required by the minimum standards or that the inspectors had any expertise in administering tests.

60. The state minimum standards require the OAIS schools to teach English language arts, mathematics, science, social studies, American history, and American government. The excellent education afforded their students by the OAIS schools suggests that the students of the OAIS schools learn and attain high skills in the required subject areas so that the only real burden placed on the schools or the students by the NGPT is the time on the school calendar required to take the test. When this "burden" is balanced against the state compelling interest, this Court concludes the balance must be struck in favor of the state.

61. In ***Vandiver v. Hardin County Board of Education***, 925 F.2d 927 (6th Cir. 1991), the plaintiff challenged a generally applicable, religious-neutral testing requirement, stating that the test was "a bigger burden than I could carry". The Court found that "no special constitutional projections have been recognized for those who feel burdened by testing". ***Vandiver***, 925 F.2d at 933.

62. There is no doubt as to the power of a state, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. ***Wisconsin v. Yoder***, 406 U.S. 205, 213 (1972)

63. The NGPT is not overly-intrusive in its mandate to the Plaintiff schools that they administer the NGPT as a condition of being chartered by the state.

64. The public has an interest in assuring the availability of high-quality education in Ohio. Plaintiffs share this interest.

65. The public interest is served by permitting members of the public to enjoy the private schools as an alternative to the public schools.

66. In the long run, continued imposition of the proficiency testing requirements will not eradicate the difference between public and non-public schools. The requirements imposed by R.C. § 3301.16 are constitutionally valid.

No. 96-3116

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO ASSOCIATION OF INDEPENDENT SCHOOLS, ET AL.,	)	
Plaintiffs-Appellants,	)	
v.	)	ORDER
JOHN GOFF, ET AL.,	)	
Defendants-Appellees.	)	

Before: MERRITT, Chief Judge; KEITH and SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panes members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/
Leonard Green, Clerk

APPENDIX B

Ohio Rev. Code Ann. §§ 3301.16: Classifying and Chartering Schools

. . . no charter shall be granted to a nonpublic school unless pursuant to division (K) of section 3301.0711 of the Revised Code the school elects to administer the tests prescribed by division (B) of section 3301.0710 of the Revised Code beginning July 1, 1995. The state board shall revoke the charter of any school district or school which fails to meet the standards for elementary and high schools as prescribed by the board. The state board shall also revoke the charter of any nonpublic school that does not comply with section 3313.612 of the Revised Code or, on or after July 1, 1995, does not participate in the testing program prescribed by division (B) of section 3301.0710 of the Revised Code.

Ohio Rev. Code Ann. §§ 3313.612: Nonpublic School Diplomas

On and after September 15, 1998, no nonpublic school chartered by the state board of education, shall grant any high school diploma to any person unless the person has attained at least the applicable scores designated under division (B) of section 3301.0710 of the Revised Code on all the tests required by that division except as follows: * * *.

Ohio Rev. Code Ann.:§ 3301.0710: Statewide Proficiency Tests

The state board of education shall adopt rules establishing a statewide program to test student proficiency for the purpose of ensuring that students who receive a high school diploma demonstrate at least ninth grade levels of literacy and basic competency in reading, writing, mathematics, science, and citizenship.

(A) (1) The state board shall prescribe five statewide proficiency tests, one each designed to measure skill in reading, writing, mathematics, science, and citizenship, and shall determine and designate the score on each such test that shall be deemed to demonstrate that any student attaining such score has achieved

at least a fourth grade level of literacy and basic competency in the measured skill.

(2) The state board may designate a grade level for testing under this section that is higher than the fourth grade level but lower than the ninth grade level; prescribe five statewide proficiency tests, one each designed to measure skill in reading, writing, mathematics, science, and citizenship; and determine and designate the score on each such test that is deemed to demonstrate at least the designated grade level of literacy and basic competency in the measured skill. No tests may be prescribed under division (A)(2) of this section unless the tests are first administered during a school year that commences on or before July 1, 1995.

(3) The state board shall prescribe five statewide proficiency tests, one each designed to measure skill in reading, writing, mathematics, science, and citizenship, and shall determine and designate the score on each such test that shall be deemed to demonstrate that any student attaining such score has achieved at least a twelfth grade level of literacy and basic competency in the measured skill.

(B) The state board shall prescribe five statewide proficiency tests, one each designed to measure skill in reading, writing, mathematics, science, and citizenship, and shall determine and designate the score on each such test that shall be deemed to demonstrate that any student attaining such score has achieved at least a ninth grade level of literacy and basic competency in the measured skill. * * *

Ohio Rev. Code Ann. § 3321.03: Compulsory School Attendance; Exceptions

Except as provided in this section, the parent of a child of compulsory school age shall cause such child to attend a school . . . . Every child of compulsory school age shall attend a school or participate in a special education program that conforms to the minimum standards prescribed by the state board of education . . . .

Ohio Rev. Code Ann. §§ 3321.38: Failure to Send Child to School

(A) No parent, guardian, or other person having care of a child of compulsory school age shall violate section 3321.01, 3321.03, 3321.04, 3321.07, or 3321.10, division (A) or (B) of section 3321.19, or section 3321.20 or 3331.14 of the Revised Code.

(B) This section does not relieve from prosecution and conviction any parent, guardian, or other person upon further violation of such sections; nor shall forfeiture of the bond relieve such person from prosecution and conviction upon further violation of such sections. Section 4109.13 of the Revised Code applies to this section.

Ohio Rev. Code Ann. §§ 3321.99: Penalties

Whoever violates division (A) of section 3321.38 of the Revised Code shall be fined not less than five nor more than twenty dollars.

Ohio Administrative Code § 3301-35-02: Educational Program

The kindergarten through twelfth grade educational program shall be implemented in accordance with adopted policies which cover paragraphs (A) to (E) of this rule. Board policies shall be available to parents, pupils, and school personnel.

(A) A written philosophy of education and educational goals shall give direction to the educational program and shall provide a basis for daily operations.

(1) The educational program shall be provided without discrimination on the basis of color, national origin, race, or sex.

(2) The philosophy of education and educational goals shall reflect pupil interests and needs identified by broad representation of community, pupils, and staff.

(B) Curriculum and instruction shall be characterized by systematic planning, articulation, implementation, and evaluation.

(1) Courses of study shall establish the basis for curriculum and instruction.

(a) A course of study shall be adopted for each subject taught. Each course of study shall:

(i) Comply with the provisions of section 3313.60 of the Revised Code;

(ii) Be based on the philosophy of education and educational goals;

(iii) Prescribe what is to be taught;

(iv) Specify subject matter objectives;

(v) Establish a scope and sequence;

(vi) Provide a basis for pupil evaluation.

(b) Courses of study shall provide for the following topics to be a part of the curriculum: career education, citizenship, human relations education, multicultural education, energy and resource conservation education, and instruction in study skills.

(c) Courses of study shall be reviewed and updated at least once every five years.

(2) Locally developed competency based education programs shall be implemented for English composition, mathematics, and reading.

(a) Pupil performance objectives shall be established for English composition, mathematics, and reading.

(b) Provisions shall be made for periodic assessment of pupil performance, including testing at least once in grades one through four, grades five through eight, and grades nine through eleven.

(c) Guidelines shall be established for the use of assessment results for instruction, evaluation, intervention, guidance, and promotion decisions.

(d) Intervention shall be provided according to pupil needs.

(e) Written policies and procedures shall be adopted by the board of education regarding the participation of handicapped pupils in locally developed competency based education programs. Provisions may be made for exemption of individual handicapped pupils from the requirements of the locally developed competency based education programs.

(f) Implementation of competency based education in English composition, mathematics, and reading shall begin no later than the 1984-85 school year, with full implementation to be completed no later than the 1989-90 school year.

(g) Competency based education programs shall be reviewed and updated at least once every five years.

(3) Daily lesson plans shall give direction for instruction and implementation of courses of study.

(4) Pupil achievement shall be monitored according to established procedures.

(a) Reports of pupil progress shall be made to parents at established intervals.

(i) An interim report shall be made to parents when pupil progress is unsatisfactory.

(ii) Parents shall be notified of problems with pupil conduct or attendance according to established procedures.

(b) Pupil records shall be safeguarded according to sections 1347.99 and 3319.321 of the Revised Code.

(5) Criteria for decisions on pupil promotion and retention shall include a requirement that pupils complete one year of American history and one-half year of Ohio studies for promotion from the eighth grade.

(6) Requirements for high school graduation shall include eighteen units earned in grades nine through twelve and shall be distributed as follows:

(a) English language arts, three units;

(b) Health, one-half unit;

(c) Mathematics, two units;

(d) Physical education, one-half unit;

(e) Science, one unit;

(f) Social studies, two units which shall include:

(i) American history, one-half unit, and

(ii) American government, one-half unit;

(g) Elective units, nine.

(h) Each pupil shall be required to complete three units in another subject in addition to the English requirement stated in paragraph (B)(6)(a) of this rule The effective date of this requirement shall be September 1, 1987.

(7) Diplomas shall be issued to pupils who complete graduation requirements in accordance with the provisions of paragraph (B)(6) of this rule and section 3313.61 of the Revised Code.

(8) Requirements for awarding credit to pupils who successfully complete courses in grades nine through twelve:

(a) Shall specify that a minimum of one hundred twenty hours be scheduled for one unit of credit with the following exceptions:

(i) Laboratory courses shall be scheduled for a minimum of one hundred fifty hours for one unit of credit;

(ii) Physical education courses shall be scheduled for a minimum of one hundred twenty hours for one-half unit of credit;

(b) Shall specify that credit courses have at least two meetings per week;

(c) Shall specify that a fractional unit of credit be awarded on a proportionate basis for a course scheduled to meet less than the minimum time required for one unit of credit;

(d) May permit more than one unit of credit to be awarded on a proportionate basis for a course scheduled for more than one hundred twenty hours;

(e) May permit pupils below the ninth grade to take advanced work for credit, but such credit may not be considered in calculating the eighteen units required for high school graduation in paragraph (B)(6) of this rule.

(9) Each building shall be open for instruction . . . .

(10) . . . for kindergarten pupils . . . .

(11) . . . for pupils in grades one through six . . . .

(12) The school day for pupils in grades seven and eight shall consist of scheduled classes, supervised activities excluding interscholastic athletics, or approved educational options for at least five and one-half hours exclusive of the lunch period.

(a) Seventh and eighth grade pupils shall be scheduled for planned instruction the equivalent of at least one thousand minutes per week for the following:

(i) English language arts;

(ii) Mathematics;

(iii) Reading or foreign language;

(iv) Science;

(v) Social studies.

(b) Seventh and eighth grade pupils shall be scheduled for planned instruction the equivalent of at least eighty minutes per week in physical education.

(c) Seventh or eighth grade pupils shall be scheduled for planned instruction the equivalent of at least eighty minutes per week in each of the following:

(i) Art;

(ii) Health;

(iii) Music.

(d) The remainder of the minimum school week for seventh and eighth grade pupils may be allocated for planned instruction in subjects specified in paragraphs (B)(12)(a) to (B)(12)(c) of this rule or in subjects such as:

(i) Business education which may include typewriting or keyboarding;

(ii) Computer science;

(iii) Home economics;

(iv) Industrial arts.

(13) The school day for pupils in grades nine through twelve shall consist of scheduled classes, supervised activities excluding interscholastic athletics, or approved educational options for at least five and one-half hours exclusive of the lunch period.

(a) A minimum of forty-five units shall be scheduled and operated in separately organized classes each year.

(b) The forty-five units shall be distributed as follows:

(i) Business or vocational business, two units of which at least one-half unit shall be typewriting or keyboarding;

(ii) Economics, one-half unit;

(iii) English language arts, four and one-half units;

(iv) Fine arts, four units of which at least one unit shall be art and one unit shall be music;

(v) Foreign language, three units if one foreign language is scheduled; or two units each if two foreign languages are scheduled;

(vi) Health, one-half unit;

(vii) Home economics or vocational home economics, two units;

(viii) Industrial arts, two units;

(ix) Mathematics, four units;

(x) Physical education, one-half unit;

(xi) Reading, one-half unit;

(xii) Science, four units, including at least two laboratory courses;

(xiii) Social studies, two and one-half units, including one-half unit of American history and one-half unit of American government;

(xiv) Fifteen units unspecified which may include twelve units which pupils may earn in vocational courses either at the home school or a vocational school.

(C) Educational options may be made available to pupils.

(1) The superintendent may approve an educational option upon evidence that:

(a) The parent has approved participation for any pupil under the age of eighteen;

(b) An instructional plan has been submitted prior to pupil participation. The instructional plan shall include:

(i) Instructional objectives;

(ii) An outline including major instructional activities, materials, and environments;

(iii) A description of criteria and methods for assessing pupil performance;

(c) A certificated teacher shall provide instruction and evaluate pupil performance in tutorial programs and independent studies;

(d) A certificated teacher shall evaluate pupil performance in correspondence courses, educational travel, and mentor programs.

(2) Promotion and retention decisions regarding pupils in kindergarten through eighth grade shall consider pupil performance relative to the objectives of an option.

(3) A maximum of six units of credit may be applied toward the eighteen units required for graduation in paragraph (B)(6) of this rule. No more than four of the six units may be applied toward requirements specified in paragraphs (B)(6)(a) to (B)(6)(f) of this rule.

(D) An experimental program may be provided to meet the identified needs of pupils subject to prior approval by the Ohio department of education.

(E) The educational program provided in accordance with paragraphs (A) to (E) of this rule shall be evaluated at least once every five years. Evaluation procedures shall be conducted according to professionally recognized criteria and procedures.

Ohio Administrative Code § 3301-35-04: Nonpublic School

A nonpublic school chartered by the state board of education shall comply with rules 3301-35-01 to 3301-35-03 of the Administrative Code, with the following modifications:

(A) Paragraph (B)(12) of rule 3301-35-02 of the Administrative Code, school day for grades seven and eight, shall apply as follows: The school day for pupils in grades seven and eight shall consist of scheduled classes, supervised activities excluding interscholastic athletics, or approved educational options for at least five hours exclusive of the lunch period.

(B) Paragraph (B)(13) of rule 3301-35-02 of the Administrative Code, school day for grades nine through twelve, shall apply as follows:

(1) The school day for pupils in grades nine through twelve shall consist of scheduled classes, supervised activities excluding interscholastic athletics, or approved educational options for at least five hours exclusive of the lunch period.

(2) A minimum of thirty-three units shall be scheduled and operated in separately organized classes each year. The thirty-three units shall be distributed as follows:

(a) Business or vocational business, two units of which at least one-half unit shall be typewriting or keyboarding;

(b) Economics, one-half unit;

(c) English language arts, four and one-half units;

(d) Fine arts, four units of which at least one unit shall be art and one unit shall be music;

(e) Foreign language, three units if one foreign language is scheduled; or two units each if two foreign languages are scheduled;

(f) Health, one-half unit;

(g) Home economics or vocational home economics, two units;

(h) Industrial arts, two units;

(i) Mathematics, four units;

(j) Physical education, one-half unit;

(k) Reading, one-half unit;

(l) Science, four units, including at least two laboratory courses;

(m) Social studies, two and one-half units, including one-half unit of American history and one-half unit of American government;

(n) Electives, three units.

(C) * * *

Supreme Court
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No. 96-1024

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

Ohio Association of Independent Schools, et al.,
Petitioner,

v.

John Goff, et al.,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do private schools have a constitutional right not to administer state high schooi proficiency tests?

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STATEMENT OF THE CASE

A. Introduction

This case involves an association (the Ohio Association of Independent Schools) and its members (the "OAIS schools") (collectively, "petitioners") who object to amended Ohio Rev. Code ("O.R.C.") § 3301.16, which requires chartered, non-public Ohio schools to administer the Ohio Ninth Grade Proficiency Test. After failing to convince the Ohio legislature to exempt the OAIS schools from the testing requirement, petitioners filed this action claiming that the test violates their First and Fourteenth Amendment rights. Both the district court and Sixth Circuit properly rejected these claims and accordingly each entered judgment against petitioners.

B. The Ninth Grade Proficiency Test

In 1987, the Ohio General Assembly passed legislation requiring public high schools to administer a ninth grade proficiency test, a state-wide exam designed to measure proficiency in four subject areas: reading, writing, mathematics and citizenship. *See* O.R.C. §§ 3301.16 and 3301.0710. The legislation required students to receive a passing score in all four subject areas of the test in order to graduate from a public high school. *See* O.R.C. § 3313.612.

On July 1, 1993, the Ohio General Assembly extended the proficiency test to chartered, non-public schools and their students. In doing so, the Ohio General Assembly followed a recommendation by the Ohio State Board of Education, which thought that private school students should take the test for two reasons: (1) all students, whether attending chartered private or public schools, could benefit from the test, and students should not be able to avoid the

requirement by transferring to a private school, and (2) the proficiency test results from those private schools that had voluntarily elected to administer the test showed room for improvement.

In October 1995, as a result of this amendment all chartered non-public schools were scheduled to administer the test for the first time. Shortly before the first testing date, petitioners filed this lawsuit alleging that the test was unconstitutional because it requires private schools to modify their curricula. After a five day trial, the district court found that the test does not intrude on private schools' ability to dictate their own curricula and found that R.C. § 3301.16 is constitutional since: (1) the legislation requires only that the schools administer the test and any extra time spent preparing for the test is the result of independent and voluntary choices made by the private schools; (2) Ohio Minimum Standards already require private schools to teach the subject areas covered on the exam; and (3) the test sets a floor of skills and knowledge that students must learn, not a ceiling. *See* Petition at A-30, A-31. The court of appeals (Merritt, Keith, *Suhrheinrich*) affirmed, holding that it is reasonable for the state to use the test to ensure that students from both public and private schools meet certain basic standards. *See* Petition at A-8. Both courts agreed that rational basis review governs this challenge. *See* Petition at A-7, A-25.

REASONS FOR DENYING THE WRIT

I. No Lower Court Split Exists On The Questions Presented.

Petitioners raise two related questions: do private schools have a constitutional right not to administer state proficiency exams? And what is the standard for assessing such claims? Neither question, as an initial matter, warrants

the Court's attention because petitioners have not established any lower-court conflict. Indeed, they have not even tried to do so.

The reason is straightforward. The Sixth Circuit is in good company on both counts. Whether looking at these matters as substantive due process or inchoate free speech claims, the lower courts have uniformly rejected them.

For example, in *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996), *petition for cert. filed*, (Nov. 26, 1996) (No. 96-848), the Fourth Circuit recently considered a challenge brought by parents to a state regulation requiring students to perform 50 hours of community service prior to graduation. Aptly recognizing that the only objection to the program was a secular one (as here), the court held that heightened review of the issue was not required. *Id.* at 178-179. Other courts have done likewise. *See Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2nd Cir. 1996), *cert. denied*, 117 S.Ct. 60 (1996) (parents' right to direct their children's secular education is subject only to rational basis review); *Vandiver v. Hardin County*, 925 F.2d 927 (6th Cir. 1991) (the Constitution does not protect those who would avoid administering or taking a test); *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988) (no fundamental right to supervise children's education to extent parents seek responsibility over every aspect of that education). Under these circumstances, the Court should not devote its limited time to this case or these issues.

II. The Sixth Circuit Correctly Held That The Constitution Does Not Prohibit Proficiency Testing Of Private School Students.

Nor have petitioners shown that this case raises substantial federal questions. Adhering to well-established

precedent from this Court, the lower courts correctly rejected petitioners' Fourteenth and First Amendment claims.

A. The Fourteenth Amendment Does Not Prohibit Proficiency Testing.

Petitioners principally argue that the proficiency test violates their Fourteenth Amendment substantive due process rights and privacy rights because it purportedly dictates the curriculum each private school must teach. This claim is mistaken as a matter of fact and as a matter of law. As a matter of fact, petitioners have simply not established that the proficiency test compels any curriculum modification at all. Indeed, the district court specifically concluded that there was no evidence that any curriculum modification would be necessary or required. *See* Petition at A-29, A-30.

As a legal matter, even granting the premise that proficiency tests compel curriculum changes, petitioners are wrong as well. Neither *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), nor *Meyer v. Nebraska*, 62 U.S. 390 (1923) are to the contrary. While *Pierce* and *Meyer* recognize that parents have a Fourteenth Amendment liberty interest in the education of their children, they also recognize that the right is not unlimited. Yes, parents may have a constitutional right to send their children to private schools, but that does not mean that the State is unable to regulate those schools. As the Court later pointed out in *Board of Education v. Allen*:

> Since *Pierce* a substantial body of case law has confirmed the power of the states to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions that provide minimum hours of instruction, employ teachers of specified

> training, and cover prescribed subjects of instruction. . . . These cases are a sensible corollary to *Pierce v. Society of Sisters*: if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.

392 U.S. 236, 246-247 (1968). To the same effect is *Runyon v. McCrary*, 427 U.S. 160, 178 (1976) which makes clear that, "while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation."

No less defective is petitioners' assertion that the test infringes their "fundamental right of privacy." Once again *Pierce* and *Meyer* simply do not go this far.

> A person's decision whether to bear a child and a parent's decision concerning the manner in which his child is to be educated may fairly be characterized as exercises of familial rights and responsibilities. But it does not follow that because the government is largely or even entirely precluded from regulating the child-bearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education. * * * Indeed, the Court in *Pierce* expressly acknowledged "the power of the State reasonably to regulate all schools, to inspect, supervise and examine

them, their teachers and pupils."

Runyon, 427 U.S. at 178. *See also Allen*, 392 U.S. at 246-247 (states have a proper interest in the manner in which private schools perform their secular function); *Murphy v. Arkansas*, 852 F.2d 1039, 1044 (right of privacy does not protect parental decisions concerning direction of a child's education).

Under Ohio law, moreover, a *Pierce/Meyer* claim is even more unsound. Ohio permits parents to avoid all but minimal state regulation over their children's education by allowing them to send children to non-chartered private schools or by allowing them to home-school them. *See* O.R.C. § 3321.04 and Ohio Admin. Code § 3301-35-078. Proficiency tests are not required in either setting.

B. The First Amendment Does Not Prohibit Proficiency Testing.

Nor is there any First Amendment doctrine that permits private schools to avoid administering proficiency tests. The only First Amendment claim raised below was that the test somehow constrained speech. The lower courts properly rejected this claim for several reasons, foremost among them the absence of any evidence that petitioners' speech had in fact been curbed.

Petitioners now raise several other First Amendment arguments for the first time. These claims obviously have been waived. At all events, the claims are flawed. Contrary to petitioners' suggestion, Petition at 8-9, the proficiency test does not prevent petitioners from teaching any particular subject, require them to teach in any particular way or force them to teach any particular ideological viewpoint.

Of course, petitioners are right that a state cannot require an individual to disseminate an ideological message. *See Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 1 (1986) (State cannot require private corporation to disseminate political messages of other groups); *Wolley v. Maynard,* 430 U.S. 706 (1977) (State cannot require individual to disseminate ideological message on license plate); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (State cannot require students to participate in pledge of allegiance). But that rule, and the cases supporting it, do not begin to establish that States lack the authority to administer a test measuring basic educational competency.

Petitioners also suggest that the test violates the First Amendment because the State requires students to give the "right" answer to the test questions. *See* Petition at 8. This may be true. But it is a problem that cannot be avoided under any of the customary methods of testing proficiency, including those in place when the First and Fourteenth Amendments were ratified. While petitioners suggest that these "right" answers may be subject to a particular bias or interpretation, petitioners are unable to point to any particular question or subject area that they find objectionable.

Petitioners next suggest that the test imposes "speech" on private schools, relying on *United States v. O'Brien*, 391 U.S. 367 (1968) and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). While both cases recognize that a State cannot prohibit certain conduct that amounts to speech due to its political nature, neither one stands for the distinct proposition that a State imposes speech restrictions by requiring a school to administer a proficiency test.

Petitioners finally try to bolster their claim by noting

that the test allows the State criminally to sanction parents whose children do not attend a chartered public or private school. Even if true, petitioners offer no explanation why this would violate the First Amendment. In any event, they are wrong. As noted, parents may send their children to private non-chartered schools and in some cases home-school their children without violating Ohio's compulsory education laws. *See* O.R.C. § 3321.04 and Ohio Admin. Code § 3301-35-078.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the Court should deny the writ.

Respectfully submitted,

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